

1 Dr. Brown testified that Plaintiff's test results were valid for lead and would not
2 represent lead from background sources or from contamination. Dr. Brown opined that
3 even though it may not be possible to establish a statistical significance between only two
4 lead results, such results are independently significant and are adequate to show the actual
5 presence of lead on the glassware. He specifically opined that Defendant's contamination
6 or background theory was unsupported because the range of results, showing various lead
7 levels for similar glasses, would not exist if the lead result was all from background.

8 Dr. Brown also identified the industry's own documents that acknowledge the
9 presence of surface lead on glassware and discussed the differences to the painted surface
10 that can result from different firing temperatures or times. (Brown Depo., 82:12-83:22,
11 Trial Exs. 7 and 8.) Dr. Brown reviewed these documents and their discussion of the
12 occurrence of "pitting" on some painted surfaces from firing – which pitting causes there
13 to be a greater surface area for release of lead. (Brown Depo., 82:12-83:22, Trial Exs. 7
14 and 8.) Dr. Brown concluded that the occurrence of pitting could increase the surface area
15 of paint available for the release of lead and effect the amount of lead leach that would
16 occur between otherwise similar patterns. (Brown Depo., 82:12-83:22, Trial Exs. 7 and
17 8.)

18 Dr. Brown explained from a toxicological perspective the significant toxic effects
19 to humans from any exposure to lead. Based upon his own studies and a thorough
20 familiarity with the current medical and scientific research on the area, Dr. Brown
21 explained how certain chemical groups exist in the blood that are critical to the formation
22 of nerves in the developing human. (See, Brown Test. 8/7.) Lead is preferentially picked
23 up by these chemicals and transported to the brain. In the brain, even extremely low
24 levels of lead interfere with the development of the brain. He distinguished the harm to
25 the brain by lead from that of Mercury. (See, Brown Test. 8/7.) Whereas Mercury can
26 break the brain nerve proteins, lead destroys the entire cell body. (See, Brown Test. 8/7.)
27 The effects of this destruction in a developing human are irreversible and irreparable.
28 (See, Brown Test. 8/7.) Even at the lowest levels, lead is shown to accumulate in the

1 brain and cause decrements in fine motor control and IQ. (*See*, Brown Test. 8/7.) Though
2 subtle, these effects are seen at lower and lower levels of lead exposure as the technology
3 for detecting them advances. (*See*, Brown Test. 8/7.)

4 b. Dr. Callahan

5 Dr. Callahan is also a Ph.D. toxicologist who has extensive professional experience
6 with industry (Chevron, Gradient Corp, Fluor Daniels, ABB Environmental), as well as
7 working for the Massachusetts Dept. of Public Health. A significant portion of her
8 educational foundation relates to neonatal lead exposure and neurochemistry.
9 Specifically, she studied the neurochemical and other effects of lead through looking at
10 lipid peroxidation and neuronal cellular damage and development. She teaches toxicology
11 and risk assessment at Northeastern University and University of Massachusetts School of
12 Public Health. (*See*, Callahan Test. 8/12.)

13 Like all of her toxicological assessments, Dr. Callahan approached her assessment
14 of cosmetic exposure in this case by looking for the existence of lead in the product and
15 the reasonable use patterns of the product to determine the different pathways of exposure.
16 (*See*, Callahan Test. 8/12.) Dr. Callahan defined "lead", for purposes of Proposition 65, as
17 including elemental lead and both inorganic and organic lead compounds. (Callahan Trial
18 Test., 423-424). Dr. Callahan based this testimony on specific inquiries and conversations
19 she had with unidentified employees of OEHHA. (Callahan Trial Test. 423-424).
20 Dr. Callahan follows the EPA and Proposition 65 definition of exposure as all leaded
21 cosmetics contacting the outer boundary of the human body. (Callahan Test., 10/27.)
22 Specifically she investigated the concentrations of lead and exposure pathways for
23 lipstick, eye shadow and eyeliner. She also looked at powder, foundation and blush. She
24 reviewed photographs and actual samples of the products at issue and received test results
25 showing underestimated lead concentration levels for each of the products. She further
26 investigated reasonable consumer use and contacted resources at Tufts engineering and
27 Proctor & Gamble to assist with the development of her foundation and opinions
28 regarding the extent of consumer exposure from Defendants' leaded cosmetics. Other

1 than her conversations with Proctor & Gamble and her review of the ingredients,
2 Dr. Callahan did not specifically know how lead was bound to the other materials in the
3 cosmetic components. Dr. Callahan did testify that all of the molecules of lead in the
4 matrix touch the skin and that the lead does not have to be released from the matrix in
5 order to be absorbed through the skin.

6 Other than her discussion with Proctor & Gamble representatives, Dr. Callahan had
7 no knowledge of how the lead was chemically combined with the other ingredients of the
8 cosmetics. Dr. Callahan found consumer "exposure" to Defendants' cosmetics from the
9 lead-containing cosmetics coming in contact with the boundary of the human body at the
10 mouth, the eyes, the nose and the dermal areas surrounding these regions. Dr. Callahan
11 also testified as to the significance of exposure to the cosmetics from their multiple re-
12 applications and the extensive duration the cosmetics are in contact with the mouth, eyes
13 and skin. Due to the friable nature of certain of the cosmetics, Dr. Callahan identified
14 oral, ocular and ingestion exposure resulting from use of the components in the cosmetic
15 kits and also opined that inhalation was a source of exposure to the lead-containing
16 powders. (See, Callahan Test. 8/12.) For lipstick, she identified direct ingestion as well
17 as indirect ingestion from hand-to-mouth, food-to-mouth, glass-to-mouth activity, etc.
18 (See, Callahan Test. 8/12.) Dr. Callahan specifically opined that the amount of a
19 substance ingested by an adult through hand-to-mouth activity is around 25%. She based
20 this opinion on the 50% factor used by the CPSC for children and the fact that the EPA
21 Exposure Factors Handbook says that adult ingestion on substances through hand-to-
22 mouth activity is 50% less than that of children. (Callahan Trial Test., 187). For eye
23 shadow and eyeliner, she identified dermal exposure and subsequent hand-to-mouth
24 ingestion as well as direct entry through the nasolacrimal and other ducts around the eye,
25 the hair follicles of the eyelash and the exposed, highly vascularized and non-lipid based
26 membrane of the eyelids. (See, Callahan Test. 8/12.) Because the conjunctiva and
27 mucosa of the eyelids and nasal passages don't have the lipid resistance to cosmetics that
28 normal skin would, and because they are rich with blood vessels, the lead has a nearly

1 direct route to the bloodstream from these areas. (*See*, Callahan Test. 8/12.) Dr. Callahan
2 relied on her prior experience with the area of ocular exposure from her consultation with
3 the military on ocular absorption of chemical agents as well as her review and study of the
4 literature describing significant lead poisoning from child and adult users of Kohl makeup
5 in India (as published in Lancet medical journal). (*See*, Callahan Test. 8/12.) She also
6 opined that hand-to-mouth activity from manual application or smoothing of the eye
7 makeup resulted in ingestion exposure. (*See*, Callahan Test. 8/12.) Dr. Callahan also
8 opined that inhalation exposure would occur during use of the powdered blush and other
9 face makeup that aerosolize easily during application. (*See*, Callahan Test. 8/12.)

10 Based upon all of these resources, Dr. Callahan testified as to consumer exposure
11 to lead from the reasonably foreseeable use of these products. She also testified that it
12 would be possible to test humans for actual exposure to lead by looking for lead in the
13 user's blood. Dr. Callahan acknowledged that the FDA had utilized analysis of blood lead
14 levels to assess lead exposure levels from the use of certain hair dyes (that are required to
15 be sold with a warning). She further opined, relying on her conversations with clerks at
16 JC Penney and Macy's West, her experience as a woman and expertise in observing
17 human behavior, that the cosmetics were marketed, packaged and used in such a way as to
18 encourage (and result in) the simultaneous use of each type of cosmetic kit component
19 with the other type. (Callahan Test., 46:12-19, 86:2-9). Dr. Callahan cautioned that there
20 was no use of any cosmetic component of the kits, either singularly or together, from
21 which no exposure would result.

22 Dr. Callahan testified that, in her opinion, during every single day in its
23 development, the fetus, an organism one ten-thousandth of the size of an adult, is
24 susceptible to immensely significant and similarly unreasonable risks from leaded blood
25 circulating through its developing systems. Dr. Callahan was aware of no literature that
26 demonstrated that a one-day exposure to lead actually caused any reproductive effect.
27 The shortest exposure study that Dr. Callahan was aware of having been performed on
28 lead exposure and adverse health effects was following 10 days of exposure to lead.

1 (Callahan Trial Test., 363:11-18.) However, Dr Callahan opined that the literature neither
2 demonstrates nor excludes the possibility that lead causes adverse effects from one day of
3 exposure. (Callahan Trial Test., 362:16-21.) She opined that during, at least, the first and
4 last trimester of pregnancy the developing brain is sensitive to any neurotoxin and that
5 "lead is surely a neurotoxin." (Callahan Trial Test., 362:28-363:10.)

6 Dr. Callahan discussed the biggest potential risk from the singular or combined
7 group of cosmetics was that to the fetus. She provided testimony regarding the different
8 stages of the development of the fetus and how, at each stage, the organism is extremely
9 susceptible to minute levels of lead infiltration. She further testified to the fact that the
10 damage lead can do, to the neurobehavioral mechanisms and systems of the developing
11 fetus, is irreversible and irreparable. (See, Callahan Test. 8/12.)

12 Dr. Callahan also specifically discussed some of the most recent medical literature
13 on the health effects of lead. Citing the Canfield article from the New England Journal of
14 Medicine, she explained how it presented further scientific support of human
15 developmental decrement from very low levels of exposure to lead. She explained that, in
16 her opinion, a fetus or newborn has been demonstrated as losing up to 7.4 IQ points
17 associated with blood lead levels within the first 10 micrograms per deciliter ($\mu\text{g/dL}$).
18 (See, Callahan Test. 8/12.) Dr. Callahan stated there was literature supporting her
19 opinion. (See, Callahan Test. 8/12.) Injuries caused by these low lead levels occur in the
20 hippocampal region of the brain because lead is in the same valence state as calcium and
21 passes the blood/brain barrier easily and include permanent losses to short-term memory
22 and emotional development as well as the loss in IQ. (See, Callahan Test. 8/12.) These
23 realized risks are caused by the increased susceptibility of the fetus during the process of
24 organogenesis, particularly in the first three (3) months of pregnancy when the mother is
25 perhaps being less careful about her physical status. (See, Callahan Test. 8/12.) Such
26 exposures can also affect, amongst other things, male and female reproductive capacity.
27 (See, Callahan Test. 8/12.) Dr. Callahan expressed the opinion that the exposures from
28 using the components of cosmetic kits are continuing and accumulating throughout the

1 development of the fetus, or even the reproductive attempts of females using the
2 cosmetics. (*See*, Callahan Test. 8/12.)

3 In addition to demonstrating consumer exposure to lead from foreseeable use of the
4 Defendants' cosmetic kit components, Dr. Callahan testified that cosmetic kit usage
5 resulted in exposures, even only on a daily basis, that exceed the Proposition 65 maximum
6 allowable daily limit of .5 µg/day and also would exceed .5 µg/9 month gestation period
7 for those that are pregnant. (Callahan Test. 10/27.) However, Dr. Callahan stated that she
8 was not preparing a complete determination or analysis of the "level in question".
9 Dr. Callahan acknowledged that she did not include exposure data for any exposure to the
10 friable cosmetics that generated respirable powder during use. Dr. Callahan expressed the
11 opinion that Plaintiff's lead concentration test result was incomplete and insufficient to be
12 representative of actual lead concentration data for the cosmetics. She testified that the
13 concentration data alone was insufficient for the purpose of calculating Defendant's "level
14 of exposure" because (1) Plaintiff's digestion was incomplete and the concentration was
15 significantly undervalued, (2) Defendant did not perform any testing to achieve the
16 complete lead concentration data for any component, (3) not all of the products in a
17 particular kit were tested and some other components could demonstrate a higher
18 concentration and (4) no concentration data was provided for the respirable powders by
19 either Plaintiff or Defendant. Nonetheless, Dr. Callahan not only testified that this
20 concentration data was sufficient to establish a detectable exposure, but that even these
21 significantly undervalued figures would demonstrated how easy it was to surpass even the
22 .5 µg/day MADL of Proposition 65. As a contrast, however, Dr. Callahan also used the
23 only produced complete digest data from the manufacturer's laboratory itself.
24 Dr. Callahan expressed the opinion that the data provided by Kolmar demonstrated actual
25 lead concentration results at least twice as much as the partial digest results from Plaintiff,
26 but she did not know what methods were used to perform that test.¹³ (Callahan Test.

27
28 ¹³ For example, plaintiff's highest concentration of lead from Fashion Fair's Beauty on The go II was 1.5 ug/gram (ppm) whereas Kolmar's own testing demonstrated a concentration of 4.5 ug lead/gram product. Similarly, where

1 10/27. Ex. 208.) Dr. Callahan further testified that one cannot do a calculation for
 2 statistical difference between Plaintiff's data and the Kolmar data because such a
 3 calculation is not appropriate with just two numbers. (Callahan Trial Test., 214:22-
 4 215:1.) Dr. Callahan opined, with respect to the Kolmar data that showed double the lead
 5 concentrations compared to Plaintiff's data, that "the manufacturer is being asked for the
 6 information, and I have no reason to think that he wouldn't be truthful with that."
 7 (Callahan Trial Test., 214:18-21.)

8 Moreover, Dr. Callahan testified that in her opinion the Proposition 65 "safe
 9 harbor" level of .5 micrograms of lead exposure per day is extremely outdated and subject
 10 to a strong movement in the scientific community for change. (Callahan Test. 10/27.) In
 11 fact, Dr. Callahan testified that in her opinion the .5 level, being based upon a blood-lead
 12 level that is no longer scientifically tenable or appropriate. (Callahan Test. 10/27.)

13 Dr. Callahan testified in her opinion as follows:

14 The .5 level is based upon the 1978 OSHA PEL of 500
 15 micrograms of lead exposure, via inhalation, per day. When
 16 promulgated, OSHA realized 500 micrograms per day would
 17 result in blood lead levels (BLLs) of approximately 40
 18 micrograms(μ g)/deciliter(dL). Moreover, OSHA recognized
 19 that even a BLL of 30 μ g/dL was not safe, but would only
 20 "minimize" the risk of reproductive toxicity in both men and
 21 women. Thus, the 1978 LOEL was 30 μ g/dL BLL. The linear
 22 exposure equation thus determined that 375 μ g lead inhaled
 23 per day would achieve the 30 μ g/dL BLL. Modern authority
 24 however, including the World Health Organization, Center for
 25 Disease Control, EPA, and the scientific community have
 26 recognized that the current lowest BLL at which adverse
 27 effects are observed is not the 1978 level of 30 μ g/dL, but
 28 10 μ g/dL or even lower.

22 Dr. Callahan identified that the 10 μ g/dL BLL comes from the American Society
 23 of Toxic Disease Registry (ASTDR) and that organization is currently in the process of
 24 reviewing the data for the purpose of revising it to a lower level. (Callahan Test. 10/27.)
 25 Nonetheless, even under the current observed effect level (LOEL) of 10 μ g/dL, the

26
 27
 28 plaintiff's highest Beauty On The go II lipstick lead concentration was .6 ug/gram, Kolmar's own testing
 demonstrated a concentration of 1.6 ug/gram.

1 inhalation exposure to appropriately achieve this level would be 125 μg lead per day
2 (375 $\mu\text{g}/3$). Converting to a NOEL results in 12.5 μg per day and adjusting to an MADL
3 results in a permissible lead inhalation exposure limit of .0125 μg lead per day
4 (125/10 = NOEL of 12.5, 12.5/1000 = MADL of .0125).

5 Even the modern relative MADL for ingestion is .0125 μg lead exposure per day.
6 Dr. Callahan explained that the FDA recognizes that ingestion of 250 μg lead per day will
7 approximately result in a BLL of 10 $\mu\text{g}/\text{dL}$ – which they also recognize is not without
8 adverse health effects. Converting this exposure, from a LOEL into a NOEL, results in a
9 NOEL level of 25 μg per day lead exposure. Converting this to a modern ingestion
10 MADL results in a daily permissible ingestion exposure of lead, under Proposition 65, of
11 .025 μg per day (25 NOEL/1000 = .025 MADL).

12 Dr. Callahan testified that for purposes of fetal protection, assessing exposures to
13 pregnant women, the EPA requires analysis of exposures at the 95th percentile to ensure
14 95% of all fetuses are protected. Further, exposure analysis should only look at exposure
15 to individuals of child bearing age since Proposition 65's warning requirement for lead
16 relates to reproductive toxicity. Further, since the reproductive harm from lead exposure
17 is presumed to occur on any day (thus every day) of fetal development, it is imperative to
18 analyze the highest exposure to each individual during pregnancy. (Callahan Test. 10/27.)

19 To perform her Proposition 65 exposure analysis, Dr. Callahan included data on the
20 concentration of lead in the lipstick multiplied by the reasonably anticipated rate of use of
21 each product. To identify the appropriate rate, Dr. Callahan measured the area of the face
22 and the duration of use as well as the number of additional contacts per day. To identify
23 the area of the relevant facial portions, Dr. Callahan provided directions to others to
24 measure both an anthropomorphic model's lips and eyes as well as a portrait artists
25 3-dimensional drawing of the same, relevant areas. The anthropomorphic model is known
26 as KEMAR and is an anatomically average model of the human head. (Ex. 154.) There
27 was no evidence that this KEMAR model had been used for the purpose of assessing the
28 area covered by cosmetics used by women. The portrait artist used a human subject to

1 convert a 3 dimensional facial portrait of the eye and lips into a 2 dimensional graphic
2 representation of their area. (Ex. 156.) The surface area of the cosmetic application areas
3 of KEMAR was measured using triangulation and the portrait area was measured through
4 an enlarged graph. The resulting eyeshadow areas measured 20 sq. cm. for the portrait
5 and 16 sq. cm. for Kemar. Eyeliner area ranged from 25.5 cm length (portrait) to 12.75
6 cm long (Kemar – only one lid available to measure so represents 50% of actual). Lip
7 area measured 6.5 sq. cm. from the portrait and 13.65 sq. cm. from KEMAR.

8 Dr. Callahan next calculated the weight of the applied cosmetic analysis by multiplying
9 the area of cosmetic applied by its density. Using her two models as upper and lower
10 bound exposure values, Dr. Callahan's calculations of the amount of cosmetic applied to a
11 user's skin exceeded the .5 μ g/day level of § 12805. For the Macy's West Christian Dior
12 Kit, the lower bound for exposure to the lipstick, eyeshadow and eyeliner was .87 μ g/day
13 with the upper bound at 8.88 μ g/day. For the Macy's West Fashion Fair Beauty On The
14 Go II (Plaintiff's data) the lower/upper bound concentrations were .42 μ g/2.12 μ g per day
15 for lipstick and eyeshadow only. Macy's West's Fashion Fair Glitter N Go the
16 lower/upper bound concentrations were .85 μ g/5.04 μ g per day and also only for
17 eyeshadow and lipstick only – not eyeliner or powder.

18 The lower/upper for J.C. Penney's Elizabeth Taylor Blockbuster was 1.73 μ g/8.88
19 μ g and their Haslton Holiday Evening Accessory Collection was 1.69 μ g/8.99 μ g lead per
20 day (lipstick and eyeshadow only). The J.C. Penney Private Portfolio Professional
21 Blockbuster was .90 μ g/6.71 μ g per day (for lipstick, eyeshadow and eyeliner). J.C.
22 Penney's private label Luxurious Traincase lipstick alone delivered 1.72 μ g lead/day
23 where the IMS Cool Bag lipstick delivered .76 μ g lead/day.

24 Dr. Callahan also identified the significant number of problems that existed with
25 the data that defense expert Michael Lakin attempted to use for his "level of exposure"
26 calculations. Dr. Callahan criticized the value of the CTFA data because it only included
27 averages for actual lipstick use over 14 days and allowed no ability to identify how much
28 a user was actually consuming on any single, relevant day. (Callahan Trial Test., 60:6-13,

1 179-180.) Dr. Callahan opined that this problem is critical in analyzing daily exposure
2 potential under Proposition 65 because a woman in the study could use very little lipstick
3 on one day and then a much larger amount the next day. (Callahan Trial Test., 61:13-21.)
4 Indeed, Dr. Callahan testified that, by the very nature of an average, some of the numbers
5 are going to be higher than the average. (Callahan Trial Test., 430:23-25.) Dr. Callahan's
6 own use data, collected using standard EPA and California EPA techniques, was higher
7 than Dr. Lakin's because she was looking at the actual single-day exposures at the 95%
8 level and not the average exposures at some lesser level. (Callahan Trial Test., 183, 347).
9 She testified that the use rates she identified for her analysis were specifically not those
10 rates of exposure that a woman would experience every day, but only a woman's exposure
11 on a typical day of actual high use. (Callahan Trial Test., 347:17-20.)

12 Dr. Callahan also opined that the specific data of the CTFA survey demonstrated
13 the study was not suitable for use in a scientific analysis of actual lipstick exposure.
14 Dr. Callahan pointed out that the study included only 7 women of the relevant
15 reproductive age in California – not enough to demonstrate statistical significance.
16 (Callahan Trial Test., 179-180.) Dr. Callahan also identified that, even using all
17 California subjects, their use rates varied unreliably – by a factor of 7 for the number of
18 applications per day (from 1 to 7) and a factor of 400 for the weight of the total daily
19 applications (from .005 to .2). (Callahan Trial Test., 63-64.) Dr. Callahan also opined
20 that the lipstick use rates and amounts from the CTFA study were significantly
21 underestimated and not suitable for use in an exposure assessment. (Callahan Trial Test.,
22 69:11-21, 71.) Dr. Callahan based this opinion on the fact that 38% of the women in the
23 study found the test lipstick to be worse than their normal lipstick, 30% did not like the
24 test lipstick and 28% used the test lipstick less often than their normal brand. (Callahan
25 Trial Test. 67:15-69:11.)

26 Dr. Callahan further identified that the CTFA data included alleged use amounts
27 for certain users of .0011 grams per day achieved with a use rate of 6.5 applications per
28 day. (Callahan Trial Test. 433-434.) Dr. Callahan explained that, at this rate, it would

1 take the user approximately 9 years and 21, 272 applications to finish a 3.6 gram tube of
2 lipstick. (Callahan Trial Test. 433-434.) Dr. Callahan concluded that “[t]hese are
3 unreasonable numbers, and I would say those data are unreliable and couldn’t be used for
4 any scientific study.” (Callahan Trial Test., 324:5-8, 434:21-23.)

5 Dr. Callahan also provided the opinion that Dr. Lakin had incorrectly represented
6 the data in his charts and opinions regarding alleged levels of exposure. Where Dr. Lakin
7 used 4 applications per day as the 90% “upper bound” figure, Dr. Callahan pointed out
8 that the CTFA data showed that almost 23% of the 18-39 year old study group, and 24%
9 of the whole study group, used the lipstick more than 4 times per day. (Callahan Trial
10 Test., 76:20-77:7). Dr. Callahan even pointed out that the EPA Exposure Factors
11 Handbook used an upper bound figure of 6 applications per day – a figure the EPA
12 specifically remarked was underestimated from including non-users in its averages and
13 from problems with the survey groups. (Callahan Trial Test., 75:26-76:6, 436:26-437:10).

14 Where Dr. Lakin utilized .01 grams per application as a 90% “upper bound” figure,
15 Dr. Callahan pointed out that the CTFA data, itself, showed that 27% of the 18-39 year
16 old women used the test lipstick more than .01 grams per application. (Callahan Trial
17 Test., 81:10-23.)

18 Where Dr. Lakin used a figure of .04 grams per day as his 90% “upper bound”
19 amount of lipstick use, Dr. Callahan pointed out that the CTFA data demonstrated that
20 22% of the users used more than .04 grams per day. (Callahan Trial Test., 82:24-83:2.)
21 Dr. Callahan also opined that risk assessment typically uses a 95% upper bound factor
22 instead of 90%. (Callahan Trial Test., 84:18-19.) Dr. Callahan even used the CTFA
23 average data to calculate the 95% upper bound of the average daily use of lipstick in the
24 study. Dr. Callahan calculated that the 95% factor of average grams used per day by all
25 18-39 year olds in the study was .117 grams, by all women in California was .175 grams
26 and by only 18-39 year olds in California was .202 grams – each significantly higher than
27 the .04 grams per day represented by Dr. Lakin. (Callahan Trial Test., 178.)

28

1 Dr. Callahan further testified that she did not believe the European Economic
2 report data was reliable because the report cautions readers not to use the data and to
3 collect their own actual data on a case-by-case basis. (Callahan Trial Test., 324:5-8.)

4 5. Misleading or Deceptive Advertising Under B&P Code
5 Section 17500

6 Dr. Mazis testified that in situations where consumers cannot determine the
7 material characteristics of the product by themselves (such as the clock speed of a
8 computer or the lead content of painted glassware or cosmetics) they especially rely on the
9 seller of the products to provide them with such information.

10 Dr. Mazis testified that, in his opinion, the relevant "advertising" for determining
11 whether a statement is untrue or misleading includes Defendant's entire marketing scheme
12 for their product. This scheme is comprised of the totality of efforts by the Defendants
13 and their employees in terms of traditional ads (whether print, radio or television), bill
14 inserts, store ads, circular copies, point of sale signs, product displays (both at the
15 individual product location and designated register, if applicable), salespersons, product
16 brand awareness, brand image, retail store brand awareness/image, and product
17 packaging. Dr. Mazis explained that of all of the marketing, the product packaging is
18 usually the most significant interface with the consumer. Once each of these factors has
19 been identified, it is appropriate to take all these together and look at the net general
20 impression. In the context of misleading advertising, an actionable "omission" is simply a
21 failure to include material information. Similarly, "materiality" in the context of
22 misleading advertising, simply means that the omitted information would have an impact
23 on the consumer's decision making or behavior toward the product, or the omitted
24 information is likely to affect the consumer's choice of the product. In essence, a material
25 omission occurs when the omitted information is important to the consumer. In
26 considering the context of an actionable omission, it is also significant to consider whether
27 there is no other easily available source for the omitted information regarding the product.

1 One such example of important omitted information is health risk information. Dr. Mazis
2 described that this is always of high significance to consumer.

3 Dr. Mazis testified that his prior extensive experience in this field demonstrates
4 that consumers are likely to read and retain packaging information regarding health and
5 safety issues more than any other.

6 His own publications demonstrate that pregnant women are acutely concerned with
7 health effects of known detriments to fetal health, such as alcohol, and that 95% of
8 pregnant women will significantly change their behavior regarding exposure to such a
9 harmful agent -- with most pregnant women eliminating the harm altogether. Dr. Brown
10 and Dr. Callahan generally testified as to the significance of consumer education about the
11 potential for lead exposure for purposes of enabling the consumer to effectively reduce
12 their own lead exposures and thus reduce their own risk. Dr. Lakin also testified
13 extensively about the benefit of educating individuals about the potential for and risks of
14 exposure to lead and other toxic substances. (Lakin Test., 9/23/03, 47-52). Dr. Lakin
15 testified that, "by making the educational programs [about lead] available to the workers,
16 one of the things [OSHA] found -- and has been found routinely by other programs that
17 have done lead abatement, lead cleanup and, therefore, lead education -- is that people,
18 rather dramatically, are able to affect their own blood lead levels by avoiding exposure."
19 (Lakin Test., 9/23/03, 49:7-12). Dr. Lakin explained that, "for instance, that if you are
20 told that you have dust in your house that has lead in it, which happens in paint abatement,
21 and you're told how to clean that lead and avoid exposure, most people do that. And they
22 very effectively reduce their own exposures, even though the lead, itself, the source,
23 hasn't been cleaned up yet. They're better able to protect themselves. In fact, what
24 OSHA found -- and I think they reported in a number of papers -- is that the workers'
25 average exposure to lead did indeed drop not only from the workplace exposure changing,
26 but probably also from their non-workplace exposure changing." (Lakin Test. 9/23/03,
27 49:13-24). Dr. Lakin also explained that "[c]ommunication is a very critical part of my
28 profession's job in risk assessment. And one of the things that we absolutely find critical

1 is providing good, reliable information to people about what exposures they're
2 receiving..." (Lakin Test., 9/23/03, 50:21-24). Finally, Dr. Lakin explained that because
3 lead is ubiquitous, and everyone is exposed to lead to some degree, that "education is
4 clearly going to help everybody reduce their overall lead exposure." (Lakin Test.,
5 9/23/03, 52:1-5).

6 Dr. Mazis testified that reasonable consumers have certain expectations about the
7 goods they purchase in stores. First, consumers expect that, if there is a toxin in a
8 consumer product then the label will provide a warning or other indication of such
9 presence and necessary precautions. Similarly, if there is no indication of a toxin on a
10 label, the consumer will expect that there are no toxins in the product.

11 Dr. Mazis testified that retailers, to a limited extent, are "consumers" of products
12 from the manufacturers and thus have certain expectations about what manufacturers will
13 do. Dr. Mazis testified that retailers have a significant amount of leverage over the
14 manufacturers or distributors from which they source their products. (Mazis Trial Test.,
15 8/14/03). Dr. Mazis explained that it was his opinion that the sheer quantity of goods
16 purchased by a retailer like J.C. Penney or Macy's West, and the potential prestige for a
17 manufacturer/distributor to have their goods on sale at these stores, are other factors that
18 give the retailer a considerable amount more power than the ordinary consumer to secure
19 and police information about the quality of the goods being ordered. (Mazis Trial Test.,
20 8/14/03).

21 Dr. Mazis opined that it would be unreasonable for a retailer to inquire of a
22 manufacturer/distributor about lead content or consumer protection compliance of a
23 product and then rely on an absence of any response to support a conclusion of an absence
24 of an issue with respect to either inquiry. (Mazis Trial Test., 8/14/03). Instead the retailer
25 should presume the worst until it could confirm to the contrary by specific, affirmative
26 response from the manufacturer/distributor. (Mazis Trial Test., 8/14/03).

1 B. Defendants' Experts

2 1. Carla Kagel, Ph.D.

3 Dr. Kagel is an analytical chemist. She testified that the EPA Method 3050B
4 (Exhibit E, solid digestion for metals), NIOSH Method 9100 (Exhibit D, surface lead
5 wipe), and ASTM Method C927 (Exhibit C, lip and rim immersion in acetic acid) test
6 methods used by Plaintiff were neither validated nor generally accepted for the purpose of
7 showing exposure to lead from cosmetics and glassware, and she believed that blood lead
8 testing was the only way to establish actual exposure to lead. Moreover, these methods
9 tested for total lead, including all organic and inorganic compounds, as well as metallic
10 (elemental) lead. Dr. Kagel did acknowledge that blood lead levels can detect wholesale
11 changes in blood from lead exposure, but cannot differentiate the source of exposure from
12 the myriad of potential exposures suffered by any given person – especially since the
13 majority of the lead is going to be absorbed by bone and soft tissue. (Kagel Trial
14 Testimony 9/9/03.) Dr. Kagel acknowledged that blood is not the “medium” to which any
15 individual is ever exposed and would not be appropriate to identify the lead concentration
16 in any given “medium” of exposure such as air, water, soil, food and and/or consumer
17 products. (Kagel Trial Testimony 9/9/03.)

18 Dr. Kagel did not perform her own tests on any of the products, but reviewed the
19 testing documents and testimony produced by Plaintiff. She testified that Plaintiff had not
20 followed a sampling plan as required by Method 3050B, which made it impossible to
21 assess the applicability of the results to other, non-tested products. Dr. Kagel testified that
22 the 3050B digestion tests of cosmetics performed by Curtis & Tompkins were in the range
23 of background lead (i.e., lead results of 5 ppm can be due to lead in the environment, and
24 not necessarily in the cosmetics). Dr. Kagel testified that she had no evidence to suggest
25 that there was contamination of the products tested by Curtis & Tompkins for Plaintiff.
26 (Kagel Trial Testimony 9/9/03.) Dr. Kagel was not familiar with each product's chain of
27 custody or the products' packaging. (Kagel Trial Testimony 9/9/03.) Dr. Kagel testified
28 that the control blanks data she reviewed—laboratory analyzed for purposes of identifying

1 contamination or improper machinery calibration—were all within the acceptable range
2 and showed no indication of any contamination. (Kagel Trial Testimony 9/8/03, 9/9/03.)
3 The results were very close to the reporting limits for the tests, and those limits were
4 unlikely to be accurate. (Kagel Trial Testimony 9/8/03 and 9/9/03.) As an analytical
5 chemist, she testified that she relies upon validation data from a laboratory as indicia of
6 reliability of the reported test results, and the lack of any validation data in the materials
7 produced by Plaintiff made it impossible for her to rule out laboratory error or other
8 causes of the reported low levels of lead in the cosmetics tested by Plaintiff. Dr. Kagel
9 testified that she charges her clients for providing reports in a similar fashion as Curtis &
10 Thompkins; without the “data validation” package. Dr. Kagel stated that this style of
11 report is absolutely appropriate and she would not ordinarily prepare a data validation
12 package herself unless specifically requested by the client, for an additional fee. (Kagel
13 Trial Testimony 9/8-9/03).

14 Dr. Kagel believed that the amount of lead that would be released by the 3050B hot
15 acid digestion exceeded the amount of lead that would be released from a cosmetic that
16 was on the skin or in the stomach of a user, given the nature of the digestion. However,
17 Dr. Kagel is not a toxicologist and did not offer an opinion on the way the cosmetic
18 products might react with an individual during an instance of exposure. Although she did
19 not have any first-hand observations of the testing, in her opinion, the types of problems
20 associated with Plaintiff’s tests and the results of those tests would be likely to
21 overestimate the amount of lead in the cosmetics. Dr. Kagel did not examine any
22 additional, independent testing data from the manufacturers of the cosmetics.

23 Dr. Kagel testified that the NIOSH 9100 wipe tests performed by Plaintiff were
24 within the range of background (5 µg/wipe). The glasses had not been washed before
25 they were wiped, and based on the documents from the laboratory, one cannot determine
26 if the lead came from the paint on the glass or an external source, since lead is ubiquitous
27 in the environment, including air and water. Dr. Kagel did not consider the equivalent
28 lead concentrations for washed glassware. Also, the 9100 method is not validated to show

1 release of metals from a surface. Therefore, she opined that the results of Plaintiff's wipe
2 tests did not show that lead was released from the painted surface of the glassware. The
3 NIOSH 9100 method is accepted and adopted for use by the Federal government and was
4 created and issued for the purpose of showing lead on the surface of objects. U.S. EPA
5 and the CPSC expressly adopted NIOSH 9100 for demonstrating the leach of lead from
6 surfaces (i.e. painted walls, mini-blinds, playground equipment, etc.). (Exhibits 135, 136).

7 Dr. Kagel testified that the C927 immersion tests performed by Plaintiff are
8 subjective, and subject to potential laboratory error due to improper equipment or
9 technique. Curtis & Tompkins modified the method by marking the 20 mm line with
10 tape, and did not validate that modification to show that the results were accurate. It also
11 modified the method by immersing glassware beyond the 20 mm line. However,
12 Dr. Kagel did not know exactly the steps taken by Curtis & Tompkins in performing the
13 glassware tests and Dr. Kagel did not identify specific laboratory error in the testing of the
14 glassware. The results of a C927 test do not necessarily bear any relationship to the
15 amount of lead that could reasonably be released from a glass through normal use.
16 Dr. Kagel did not study the type of beverages that might be used in a glass, including juice
17 or wine, nor did she study Dr. Brown's wash and wipe test.

18 2. Michael L. Lakin, Ph.D., DABT

19 Dr. Lakin is a board-certified toxicologist, who has extensive experience in risk
20 assessment and Proposition 65 exposure assessments. Dr. Lakin testified regarding
21 exposure to lead from cosmetics. Dr. Lakin testified that Plaintiff had not shown an
22 exposure to lead from cosmetics. First, he testified that the 3050B Method is not specific
23 to the lead listed under Proposition 65, which is limited to the OSHA listing of metallic
24 lead, inorganic lead, and organic lead soaps, and does not itself meet the requirements of
25 22 Cal. Code Regs. § 12901. Dr. Lakin acknowledged the FSOR for § 12805 providing
26 the MADL for lead does not reference any limitation on what constitutes "lead", nor does
27 the listing of the chemical itself. Dr. Lakin admitted that compounds of lead, inorganic
28 and organic alike, contain the same elemental lead, and breakdown to the same elemental

1 lead. Second, any lead that is in the cosmetic would be in a matrix, and no tests had been
2 performed to show that the lead was available to penetrate the skin or be absorbed in the
3 stomach. Dr. Lakin did not do any research into the chemicals in the lipstick formulation
4 or how those chemicals bonded together to otherwise for a “matrix.” Third, lead on the
5 skin is not an exposure to lead from a toxicological perspective, because there has been no
6 demonstration that the lead is or can penetrate the skin, and “contact” with a boundary to a
7 toxicologist (as the word “contact” is used in 22 Cal. Code Regs. § 12102 (i)) means
8 communication with the boundary). In order for lead to cause reproductive effects it must
9 enter the bloodstream, and the only validated and generally accepted method of
10 demonstrating exposure to lead is by measuring blood lead. Dr. Lakin based his opinion
11 of dermal absorption of inorganic lead on dermal absorption factors utilized in
12 government “lead spread models”, on a research paper published in 1988, and the EPA
13 dermal absorption guidance document. As for blood lead levels, they do not distinguish
14 between “old lead” that is being released from bone and “new lead.” In Dr. Lakin’s
15 opinion, there was no evidence from which one could determine that any lead in
16 cosmetics was capable of crossing, or in fact did cross, the skin, or was ingested or
17 absorbed through the ocular area. Dr. Lakin had not studied the structure of the eye with
18 respect to absorption of lead. Dr. Lakin acknowledged that the conjunctiva, or inner
19 eyelid, was highly vascularized and had no protective lipid layer to withstand absorption
20 of the lead in makeup. (Lakin Trial Testimony 9/28-9/30/03.) Dr. Lakin also admitted
21 that the naso-lacrimal gland functioned like a giant drain to bring materials contacting the
22 eye or eyelid down into the nasal passage, mouth and stomach—all the way along another
23 highly vascularized wall of easily penetrable epithelial cells. (Lakin Trial Testimony
24 9/28-9/30/03.)

25 Dr. Lakin testified that, assuming the lead tested by Plaintiff was the chemical
26 listed under Proposition 65, and that Plaintiff’s tests data in fact showed lead (i.e., was
27 reliable), the amount of lead in the cosmetics did not exceed the level that required a
28 warning under Proposition 65. Dr. Lakin performed a theoretical upper bounding estimate

1 (“TUBE”) to assess the potential magnitude of the exposure. Following the safe harbor
2 approach of 22 Cal. Code Regs. § 12821, as explained in the Final Statement of Reasons
3 (FSR) for Article 8 of the Proposition 65 implementing regulations (Exhibit G), he
4 compared the reasonably anticipated rate of intake or exposure, (based on product usage
5 data and lead content) with the Maximum Allowable Daily Level (MADL) of 0.5 µg /day
6 for lead established by 22 Cal. Code Regs. § 12805(b). He relied upon Plaintiff’s test data
7 for the amount of lead in cosmetics, which he believed was likely to overestimate actual
8 exposure due to the acid digestion. He relied, based on guidance in § 12821, upon
9 product usage information from the EPA Exposure Factors Handbook (Exhibit 4Ms), the
10 CTFA Study of lipstick usage (Exhibits 40s and 5Gs), and the European Union Notes of
11 Guidance for Testing of Cosmetics Ingredients for Their Safety Evaluation (Exhibit 4Ns),
12 to estimate the amount of product used by average users of the cosmetic products.

13 Based on these data, the amount of lead placed on the skin of the user for any
14 individual product within a cosmetic kit, and for a worst-case use of all tested products in
15 any cosmetic kit, did not exceed 0.5 µg/day, whether the user was an average user, or in
16 the upper 90th percentile of all users. Dr. Lakin testified that it would not be proper to
17 include all exposures to lead from the various components of the cosmetic kits in one
18 exposure assessment, because the products were not necessarily used together by the
19 average user; however, including all of the products did not cause the amount of lead
20 applied to the skin to exceed 0.5 µg/day.

21 Dr. Lakin testified that standard toxicological exposure assessment principles
22 required the analysis of actual absorption of lead through the skin and stomach. These
23 principles were consistent with Proposition 65’s implementing regulations as described in
24 the “pattern and duration of exposure” in § 12821 and with guidance in the Final
25 Statement of Reasons that indicated it was appropriate for absorption to be considered in
26 determining whether an exposure posed no observable effect within the meaning of
27 Proposition 65. Dr. Lakin testified that it would not be inappropriate to apply absorption
28 to different routes of exposure to lead when using the 0.5 µg/day MADL, as that MADL

1 had been developed based on inhalation data only, and lead was absorbed very poorly, if
2 at all, by dermal contact, and at ranges of 6-10% by ingestion under average conditions,
3 compared with very efficient absorption of lead when inhaled. Dr. Lakin testified that
4 there was no prohibition in the regulations or Final Statement of Reasons against applying
5 route-specific absorption data, and that the California Environmental Protection Agency
6 Office of Health Hazard Assessment (OEHHA) had changed its practices to do so when
7 adopting MADLs in light of a recommendation from a peer-review of its risk assessment
8 practices in the mid-1990s (approximately 10 years after the lead MADL had been
9 adopted). When Dr. Lakin included the standard absorption factors used by Cal/EPA and
10 federal EPA, the amount of lead exposure he calculated from the cosmetics was at least
11 1000 times below the MADL for all products within a kit.

12 Dr. Lakin did not test any cosmetic products, as the Plaintiff's test results were
13 orders of magnitude below the warning level, and there was no reason to believe that
14 further testing would result in significantly elevated exposures. Dr. Lakin rejected the
15 after-the-fact argument that Plaintiff's test results were inaccurate and underestimated the
16 total amount of lead in the products.

17 Dr. Lakin testified that exposure to lead is not properly assessed on a one-day
18 basis, because it is not a teratogen. Toxicologists, and California state agencies, typically
19 assess lead exposure on a 30-day average exposure, because the reproductive effects for
20 which it is listed are based on chronic exposure. For purposes of his assessment, he
21 assumed that the exposures he calculated were occurring every day. Dr. Lakin testified
22 that the amount of lead to which a women would be exposed would not be detectable in
23 her blood. He also testified that the products posed no danger to users from any lead that
24 was contained in them.

25 3. James W. Embree, Ph.D., DABT

26 Dr. Embree is a board-certified toxicologist, who has extensive experience in risk
27 assessment and Proposition 65 exposure assessments. Dr. Embree testified regarding
28 exposure to lead from painted glassware. Dr. Embree testified that Plaintiff had not

1 shown an exposure to lead from cosmetics, because Plaintiff had not tested for the specific
2 listed chemical in the specific medium, as is required under 22 Cal. Code Regs. § 12901.
3 Dr. Embree performed some testing of paint on glassware, but it did not change his
4 opinion that Plaintiff did not test for the listed chemical for the specific medium.

5 Dr. Embree testified that the ASTM C927 Method does not show an exposure to
6 lead from glassware, as it is not validated to do so, and the method specifically states that
7 it does not represent actual conditions of use. Dr. Embree acknowledged FDA comment
8 that the C927 voluntary testing program "will ensure that the public is not presented with
9 any significant health risk due to lead . . . that may leach from decorated glass tumblers."
10 (Ex. 4D, p. 58633.) Although he did not observe the Curtis & Tompkins testing for
11 Plaintiff, his own pilot testing with acetic acid led him to believe that there were potential
12 problems with the tests performed by Curtis & Tompkins. These potential problems
13 included the improper equipment used to perform the test and the possibility of
14 contamination or disturbance of the samples while the test was being performed. His own
15 pilot testing with artificial saliva led him to conclude that acetic acid immersion for 24
16 hours did not provide any realistic assessment of whether lead leached from the glassware
17 under normal conditions of use. Dr. Embree admits his protocol is experimental and does
18 not establish an approved scientific methodology for lead leaching from paint on a glass.
19 Dr. Embree did not take account of the possible acidity of the beverage being consumed
20 on the exterior rim, which may have a similar acidity to the leaching solution used in the
21 C927 Method. The use of the C927 Method did not meet § 12901 because it is not
22 specific to the listed lead, but tests for all lead, and the medium tested is acetic acid, which
23 is not the medium to which the user is exposed.

24 Dr. Embree acknowledged that the NIOSH 9100 wipe test is a federally created
25 standard adopted for identifying the surface presence of chemicals on an object.
26 However, Dr. Embree testified that the NIOSH 9100 wipe tests did not show an exposure
27 to lead from glassware for several reasons. First, the method is not validated to show
28 exposure to lead leaching from a surface, as it is only validated to show environmental

1 contamination of lead. Since Plaintiff had not washed the glasses before testing them,
2 there was no basis to conclude that the lead in the tests came from the paint on the glass.
3 Second, the method is not specific for the listed lead, but tests for all lead, and the medium
4 tested is the lead itself on the surface of the glass.

5 In Dr. Embree's opinion, from a toxicological perspective, the medium of concern
6 is that which carries the chemical to the body. Thus, the media to which the user was
7 exposed to lead that might be released from the painted glass surface could be the saliva
8 (in the case of direct contact) or the object to which the lead was supposedly transferred,
9 such as a piece of bread (in the case of indirect contact). FSOR for 22 CCR § 12821
10 defines the "medium" as a certain type of food or a consumer product, but that the
11 exposure from a given medium will depend upon the medium, its anticipated use and
12 other circumstances. (Exhibit G, pg. 83). Dr. Embree testified that the medium at issue in
13 this case is not the product, because the user is not actually ingesting the product.
14 Because there was no method that met the requirements of § 12901, in his opinion there
15 was no showing of exposure to lead from the products. While acknowledging that
16 NIOSH 9100 and ASTM C927 are adopted by both State and Federal governments,
17 Dr. Embree, as with Dr. Lakin, testified that the only validated and generally accepted
18 method of demonstrating exposure to lead is by measuring blood lead.

19 Dr. Embree testified that, even assuming that the tests showed the listed chemical,
20 because the various potential media of exposure had not been identified or tested, there
21 was no method that met the requirements of § 12901 that would allow for the
22 quantification of the amount of lead to which average users were exposed. If he was
23 forced to accept Plaintiffs tests as demonstrating an exposure (thus meeting § 12901), then
24 he opined, in his professional judgment, that the user would only ingest approximately 5%
25 of the total amount wiped off of a glass with the modified NIOSH 9100 methodology.
26 Dr. Embree agreed that this 5% "guesstimate" was just a personal, professional judgment.
27 This judgment was not made to any reasonable degree of scientific validity or certainty;
28 not based upon any scientific study or principle. Dr. Embree did not analyze the hand-to-

1 mouth ingestion and he rejected both the CPSC's 50% figure from the mini-blinds
2 experiment and the CPSC's 43% figure from the playground equipment investigation, as
3 well as the EPA's Exposure Factors Handbook's reported comparison of the hand-to-
4 mouth ingestion rates between children and adults of 50%. In analyzing his modified test,
5 Dr. Embree concluded that not all lead transferred to the hands would ultimately be
6 ingested, and then premised his quantification estimate on several grounds including,
7 (a) the pad used to wipe the glass was more abrasive than a finger; (b) fingers of the user
8 would not contact the entire surface of the decoration, in contrast to the wipe, which was
9 intended to cover the entire surface area (Dr. Embree did no investigation into how a
10 normal user would use the glass, where they might contact it, whether any contact might
11 involve rubbing the surface of the paint, the length of duration of the contact or the
12 temperature and content of the glass.); (c) the handling of the product when it was used by
13 the consumer; and (d) any lead transferred from the glass to the fingers could remain on
14 the fingers, be transferred to an object and never enter the mouth, be transferred back to
15 the glass, or be transferred directly or indirectly to the mouth.

16 In Dr. Embree's opinion, any glass with wipe test results of 10 $\mu\text{g}/\text{wipe}$ would
17 meet the 0.5 $\mu\text{g}/\text{day}$ MADL. The estimate did not take into account any absorption of
18 lead from the digestive tract; however, Dr. Embree testified that the relatively poor
19 absorption of insoluble inorganic lead in the digestive tract would decrease the actual
20 exposure to the user by 90%, based on data for such lead in the Agency For Toxic
21 Substances ATSDR Toxicological Profile for lead. Dr. Embree had no specific
22 information on what species of lead was present in the paint. He also had no information
23 on solubility, except that he believed that the lead was inorganic and soluble because the
24 glass would be washed before use. Dr. Embree testified that the use of absorption data
25 was a principle of toxicological risk assessment, and was specifically identified as
26 appropriate under the FSR for Article 8, including for ingestion of lead. As with
27 Dr. Lakin, Dr. Embree testified that it would not be inappropriate to apply absorption to
28 different routes of exposure to lead when using the 0.5 $\mu\text{g}/\text{day}$ MADL, and there was no

1 prohibition in the regulations or Final Statement of Reasons against applying route-
2 specific absorption data to the MADL. When applying this standard absorption factor,
3 any wipe result of 100 μg or less would not exceed the 0.5 $\mu\text{g/day}$ MADL.

4 Dr. Embree did not average a user's exposure over multiple days, although he
5 believed it would be appropriate to do so for the purposes of chronic exposure analysis to
6 lead. For purposes of his assessment, he assumed that the exposures he calculated were
7 occurring every day. He also testified that, assuming exposure to the amount of lead in a
8 wipe test, such exposure would not be detectable in the bloodstream of the user. He also
9 testified that the products posed no danger to users from any lead that was contained in
10 them.

11 4. David Stewart, Ph.D.

12 Dr. Stewart is a Professor of Marketing, and Deputy Dean of the Marshall School
13 of Business, at the University of Southern California. Dr. Stewart testified that whether
14 an omission is material depends on whether conveying the information will change the
15 reasonable consumer's behavior. He testified that studies suggest that consumers don't
16 think in terms of levels of chemicals, but is this a safe product, and should I exercise
17 caution? Consumers look to experts to set standards in certain situations. In Dr. Stewart's
18 opinion, it is not misleading to not warn about exposures to chemicals that are not
19 potentially harmful. And, in the absence of any proof that products are potentially
20 dangerous, the presence of lead is not "material" to an ordinary consumer, and it is
21 therefore not misleading to omit identification of lead in the product. (Stewart Trial
22 Testimony 10/7/03).

23 As he understands that lead is ubiquitous in the environment, Dr. Stewart testified
24 that there are potential adverse impacts from Plaintiff's disclosure theory. Warnings
25 about lead in non-harmful amounts may deluge consumers and drown out important
26 warnings. Warnings may cause consumers to forego benefits from presence of lead (e.g.,
27 certain colors in glassware) without any increase in safety. A warning in the
28

1 circumstances of this case is potentially misleading to consumers, given the lack of
2 potential harm from the products, and these other factors.

3 Dr. Stewart testified that it would be inappropriate to determine the need for
4 warnings based on the aggregate risk posed by all of the products within a kit, as opposed
5 to the individual products. Manufacturers typically bundle products together because
6 consumers are likely to use those products together, but if the individual products are
7 dangerous only in combination, the activity that needs to be addressed is the lifestyle
8 choice of the user, not the way in which the products are packaged. Warnings on "kits"
9 that are based on aggregation of risk from individual products will drive consumers to the
10 same products separately-sold and individually-packaged, and will create no health
11 benefit, because the consumers are subject to the same risk from the aggregate use of the
12 individual products.

13 Dr. Stewart did not generally know whether the majority of the cosmetic kits
14 contained components that were available for individual sale. Dr. Stewart acknowledged
15 that B&P Code § 17500 does not concern itself with potential adverse impacts, only
16 whether the consumer is likely to be misled. Dr. Stewart agreed that the relevant standard
17 is whether the omitted information would affect a consumer's decision to purchase the
18 product.

19 V. EVENTS AFTER THE FILING OF THE NOTICES AND COMPLAINTS

20 A. Macy's West's Actions Following Receipt of Notice for Cosmetics

21 On November 20, 2001, Plaintiff served Macy's West with a 60-Day Notice of
22 alleged violation of Proposition 65 for selling certain cosmetic kits containing lead
23 without a clear and reasonable warning. *See* Exhibit 91. The notice specifically identified
24 the products at issue as "COSMETIC KITS" and further referenced, as specific examples,
25 "The Color Institute Spring Beauty" and "The Color Institute Color Ensemble" cosmetic
26 kits, manufactured by Markwins. The notice identified Markwins as the "manufacturer"
27 of the products at issue.

28

1 Ms. Morello, Ms. Barr and Ms. Campbell all testified that they had never heard
 2 anything about lead being in any cosmetic products prior to receipt of Mr. DiPirro's 60-
 3 Day Notice alleging consumer exposures to lead from cosmetics. Macy's West's
 4 representatives did not contact vendors for the purpose of confirming whether or not the
 5 vendor's cosmetics contained lead. The representatives did not consider suspending the
 6 sale of the products identified in the Notice. (Barr Trial Testimony 9/10/03, 9/30/03;
 7 Campbell deposition testimony at 52:21-25).

8 After receiving the 60-day notice, counsel for Macy's West contacted Markwins
 9 regarding the notice and tendered the defense of Macy's West on or about November 28,
 10 2001. (Exhibit 6Ws.) Markwins never responded to the tender letter. Macy's West did
 11 not follow up on the letter, but soon learned that, on December 21, 2001, Markwins
 12 entered into a settlement with Plaintiff that covered cosmetic kits and provided a
 13 downstream release for its retailers. (Exhibit 95.) The Consent Judgment specifically
 14 provided that Markwins agreed to a Reformulation Commitment as follows: "**1.1**
 15 **Reformulation Timetable.** Beginning immediately, Markwins shall initiate or otherwise
 16 arrange for diligent efforts to be undertaken to revise the Product's formulations so as to
 17 *eliminate the presence of lead*, as that phrased is defined in paragraph 1.4, below. As of
 18 July 31, 2002, Markwins agrees not to manufacture or sell (or cause to be manufactured or
 19 sold on its behalf) any of the Products unless each such Product has been manufactures so
 20 as to *eliminate the presence of lead*, as that phrase is defined in paragraph 1.4, below....**1.4**
 21 **Lead Content.** Through reformulation, Markwins intends to completely *eliminate the*
 22 *presence of lead* in the Products. Markwins asserts, however, that it may be impossible to
 23 remove all detectable amounts of lead from the Products. Therefore, for purposes of this
 24 Settlement Agreement, the *presence of lead* shall be deemed to be eliminated in the
 25 Products according to the following schedule: 1) no lipstick shall contain greater than .35
 26 parts per million (ppm) of lead; and 2) no other cosmetic item, including eyeshadows and
 27 blushes, shall contain greater than .5 parts per million (ppm) of lead. Markwins shall use
 28 EPA testing methodology 6020 or 6010 to determine whether the respective levels have

1 been exceeded in their cosmetic products. The parties agree that Markwins may modify
2 the test method so long as: 1) the method is appropriate under 22 CCR § 12901; and 2)
3 DiPirro is provided 30 day written notice of the requested modification. Consent by
4 DiPirro to such modification shall not be unreasonably withheld.” (Emphasis in original.)
5 The Consent Judgment further expressly provided that “[n]othing in this Agreement shall
6 be construed as an admission by Markwins of any fact, finding, issue of law, assertion,
7 allegation or violation of law, nor shall compliance with this Agreement constitute or be
8 construed as an admission by Markwins of any fact, finding, conclusion, issue of law, or
9 violation of law.” (Exhibit 95). After receipt of the complaint, Macy’s West’s counsel
10 contacted counsel for Markwins regarding the tender letter and the allegations contained
11 in the complaint. Markwins’ counsel informed Macy’s West in May of 2002 that they did
12 not respond to the tender because Markwins had settled the matter with Plaintiff in
13 December 2001. (Brandt Trial Testimony, 10/14/03; Exhibit 95.)

14 On May 2, 2002, Plaintiff filed his complaint against Macy’s West. (Exhibit 6Es.)
15 The complaint offered no additional information with respect to the nature and extent of
16 the alleged violations as set forth in the 60-day notices. Upon receipt of the lawsuit,
17 Ms. Brandt attempted to contact the counsel listed on the original 60-Day Notice, David
18 Bush. Mr. Bush’s office referred Ms. Brandt to counsel of record Gregory Sheffer.
19 Ms. Brandt contacted Mr. Sheffer in June 2002 in an attempt to ascertain which cosmetic
20 kits were at issue in the lawsuit in light of the Markwins settlement. Mr. Sheffer referred
21 Ms. Brandt to his partner Clifford Chanler. Ms. Brandt instructed outside counsel, Jeffrey
22 Margulies to contact Mr. Chanler to determine exactly what products were at issue in the
23 DiPirro lawsuit. (Brandt Trial Testimony, 10/14/03.) Mr. Margulies contacted
24 Mr. Chanler on or about May 23, 2002 and requested the following clarification on the
25 products at issue: “Cliff, as we discussed recently, the only product named in the 60-day
26 notice served on Macy’s West was the Markwins cosmetic kit. The complaint names
27 ‘cosmetic kits containing eye shadows, blushers, lipsticks, lipliners and/or nail polishes,’
28 but as I have remarked, Macy’s West has no idea what products are involved, which

1 vendors to notify, or even how to respond to this complaint. Please advise which, if any,
 2 products other than the Markwins products you believe that Macy's sold an contain lead
 3 as alleged in the complaint." Mr. Chanler responded on May 24, 2003, via email, as
 4 follows: "There are other cosmetic product with lead. Sorry for the delay; I will get you
 5 the information early next week." (Exhibit 1022). Mr. Margulies followed up on this
 6 communication on or about June 6, 2002, but no further cosmetic kits were identified by
 7 Mr. Chanler. (Brandt Trial Testimony, 10/14/03; Exhibit 1022.)

8 Ms. Brandt sent a tender letter on July 31, 2002 to all of Macy's West's cosmetics
 9 vendors. The letter indicated that the vendor's products might be implicated but that
 10 Macy's West did not have enough information. ("The complaint fails to specify the brand
 11 name of the cosmetic product(s) at issue, and therefore we are tendering this matter to
 12 each of the vendors that we do business with that manufacture eye shadows, blushers,
 13 lipsticks, lip liners, and nail polish.") (Exhibit 6X's). The letter further requested that the
 14 vendors confirm that their products comply with all laws, specifically Proposition 65, and
 15 inform Macy's West if their products did not comply, so that appropriate action could be
 16 taken. ("Federated will not knowingly offer for sale in California products that do not
 17 comply with Proposition 65... Please send me a letter confirming that your products
 18 comply with Proposition 65... Should you learn at any point in the future that your
 19 products do not comply with Proposition 65, you must immediately notify Federated so
 20 that appropriate action may be taken.") (Brandt Trial Testimony, 10/14/03; Exhibit 6Xs.)
 21 No cosmetic vendor indicated that their products did not comply with Proposition 65 or
 22 that their products exposed consumers to lead. (Exhibit 6Ys.) Ms. Brandt did not follow-
 23 up on the tender letters or her request regarding compliance with Proposition 65. Later,
 24 Shisheido and Loral specifically affirmed that their products complied with
 25 Proposition 65. (Brandt Trial Testimony, 10/14/03.) Ms. Brandt testified that no vendor
 26 had agreed to or made any financial contribution pursuant to Macy's West's letter.

27 Macy's West filed a Demurrer on June 6, 2002, which came on for regular hearing
 28 on July 18, 2002. This Court found that the Plaintiff's "60-Day Notice", and the ensuing

1 Complaint, adequately complied with all of the notice requirements of California Health
2 & Safety Code, Section 25248.7, such as to give Defendant adequate description of the
3 products at issue and adequate notice of Plaintiff's claims against them. Based upon these
4 and other findings, Macy's West's Demurrer was overruled. On October 21, 2002,
5 Defendants filed their petition for writ of mandate contesting the ruling on Demurrer. On
6 November 7, 2002, the First Appellate District denied Defendants' petition for writ of
7 mandate without comment.

8 Because Macy's West did not receive any information from its vendors that
9 identified which products contained lead, on September 6, 2002, Macy's West served
10 special interrogatories on Plaintiff requesting, *inter alia*, that Plaintiff identify any
11 cosmetic kits sold by Macy's West that allegedly contained or exposed users to lead, other
12 than those manufactured by Markwins. (Exhibit 6Fs.) Plaintiff's initial response to
13 Macy's West's discovery did not identify any additional cosmetic kits and merely referred
14 Macy's West to the 60-Day Notice. (Exhibit 6Gs.) Following a meet and confer process,
15 Plaintiff agreed to supplement his responses to Macy's West's discovery, however, his
16 supplemental responses did not identify any additional cosmetic kits and referred, again,
17 to the 60-Day Notice. (Exhibit 6Hs.) Macy's West filed a Motion for Summary
18 Judgment on December 24, 2002, contending that there was no triable issue of fact, since
19 Plaintiff had released Macy's West from liability for sale of Markwins products as a result
20 of his settlement with Markwins, was limited to the Markwins products by his 60-day
21 notice, and had failed to identify any other allegedly violative cosmetic kits. After a
22 continuance to allow Plaintiff to conduct discovery, that motion was heard on June 23,
23 2003, and denied in an order dated September 8, 2003.

24 On January 27, 2003, Plaintiff served his second supplemental responses to Macy's
25 West's first set of discovery. (Exhibit 6Is.) In the second supplemental responses,
26 Plaintiff identified cosmetic kits distributed by Fashion Fair for the first time. Fashion
27 Fair had been sent one of the original tender letters, but had never responded. (Brandt
28 Trial Testimony, 10/14/03). On February 5, 2003, the deposition of Plaintiff Michael

1 DiPirro was taken but no additional cosmetic kits were identified as being at issue in the
2 lawsuit other than those previously identified in discovery responses. On February 14,
3 2003, Macy's West sent follow-up correspondence to Fashion Fair informing them that
4 Plaintiff has specifically identified their products as containing and exposing users to lead.
5 (Exhibit 99.) On March 24, 2003, Fashion Fair sent correspondence to Macy's West
6 forwarding test results indicating the presence of lead in some of the components of the
7 Beauty on the Go and Glitter 'N Go products. (Brandt Trial Testimony, 10/14/03; Exhibit
8 99, p. 1262). In Plaintiff's fourth supplemental responses to Macy's West's first set of
9 discovery, served on April 21, 2003, Plaintiff identified an additional cosmetic kit,
10 Christian Dior's Esprit De Bruns. (Exhibit 6Ks.) Plaintiff for the first time produced
11 summary lead testing results with his fourth supplemental interrogatory responses.
12 Follow-up correspondence was sent to Christian Dior but Macy's West never received any
13 information from the vendor regarding lead in cosmetics before Ms. Brandt took her
14 maternity leave shortly before trial in June 2003. (Brandt Trial Testimony, 10/14/03.)

15 Plaintiff did not produce documents identifying the laboratory testing of the
16 cosmetics until after the commencement of trial, claiming that discovery prior to that time
17 was precluded by the work product doctrine.

18 On May 31, 2002, Plaintiff propounded his First Set of Special Interrogatories to
19 Macy's West. Interrogatory No. 1 requested that, in response to a request for the total unit
20 quantity of products sold, Macy's West identify cosmetic kit sold by brand name, product
21 name and product description. Defendant's responses to this discovery request did not
22 identify any products sold by Macy's West. Macy's West responded with a global
23 objection to Plaintiff's definition of "PRODUCTS", in that, "it requests information about
24 products not sufficiently identified in Plaintiffs 60-day notice, and thus seeks information
25 that is NOT RELEVANT." In response to a PMK deposition notice, Macy's West
26 designated the following people: Elizabeth Morello, Carye Campbell and Jill Barr.
27 Plaintiff objected that the witnesses were not qualified witnesses in that they had not done
28 a sufficient investigation and were not knowledgeable. Plaintiff served additional

1 discovery on March 13, 2003, seeking, among other things, product identification. On
2 June 5, 2003, at a hearing before Commissioner Norris on Defendants' Motion for a
3 Protective Order, Plaintiff was ordered to designate up to 50 interrogatories for Macy's
4 West to answer. Defendants' June 30, 2003 responses did not identify any cosmetic kits
5 sold by Macy's West pending a ruling on their Motion for Summary Judgment. (On
6 July 15, 2003, Plaintiff made an Ex Parte Application to have his Motion to Compel heard
7 on shorten time, a motion that Commissioner Norris denied.)

8 At the beginning of trial, Plaintiff served discovery on both Defendants in the form
9 of Special Interrogatories and Requests for Production. Defendants objected to the
10 breadth and form of the trial discovery. On July 31, 2003, the Court made the following
11 orders regarding discovery: (a) the Defendants were ordered to respond in part to the
12 discovery, (b) the term "cosmetic kit[s]" in the definition of the term "PRODUCTS" in
13 each Interrogatory No. 1, respectively, for purposes of this discovery, shall mean a
14 collection of separate cosmetics packaged and/or sold together from three or more of the
15 following six categories: (1) lipstick, (2) lip liner/lip pencil, (3) eye shadow, (4) mascara,
16 (5) blush/facial powder and (6) eye liner/eye pencil; (c) Defendants shall provide a report
17 advising the Court of the date on which sales data for the products sold in California in
18 response to each Interrogatory No. 2 can be produced; and (d) to the extent that
19 Defendants claim attorney-client and/or attorney work product as an objection to
20 information sought in the interrogatories or requests for production, Defendants shall
21 produce a privilege log of any information withheld, excluding only information created
22 by or sent to or from trial counsel for Defendants, Jeffrey B. Margulies, Esq. and
23 Rachel D. Stanger, Esq. of Parker, Milliken, Clark, O'Hara and Samuelian (and/or
24 predecessor counsel for J.C. Penney), after the Complaints were filed in each of these
25 consolidated cases, respectively.

26 Defendant Macy's West served responses to Plaintiff's first set of trial discovery
27 on August 7, 2003. The responses identified all products that met the definition of
28 "cosmetic kit" as determined by the Court. The majority of the products identified were

1 Gifts with Purchase and Purchases with Purchase. No evidence was presented at trial
 2 demonstrating that any of the products identified in the responses to trial discovery
 3 contained lead.

4 B. J.C. Penney's Actions Following Receipt of Notice for Cosmetics

5 On October 11, 2000, Plaintiff served J.C. Penney with a 60-Day Notice of alleged
 6 violation of Proposition 65 for selling certain cosmetic kits containing lead without a clear
 7 and reasonable warning. See Exhibit 92. The notice specifically referenced the products
 8 at issue as "Eyeshadows, Blushes, Cosmetic Kits" and provided an example of such
 9 products by including the parenthetical phrase, "such as Markwins' Wings of Beauty
 10 cosmetic kits." After receipt of the 60-day notice pertaining to cosmetics, J.C. Penney
 11 joined a joint defense group that included Markwins and other retailers that had received
 12 similar notices in October – November 2000. Prior to receipt of the lawsuit, J.C. Penney
 13 did not discuss lead in cosmetics with any vendors other than Markwins. J.C. Penney
 14 never received any test results for Markwins' cosmetics. (Harokopus Trial Testimony,
 15 11/6/03). On December 21, 2001, Markwins entered into a settlement with Plaintiff that
 16 covered cosmetic kits and provided a downstream release for its retailers. (Exhibit 95.)
 17 The Consent Judgment specifically provided that Markwins agreed to a Reformulation
 18 Commitment as follows: "**1.1 Reformulation Timetable.** Beginning immediately,
 19 Markwins shall initiate or otherwise arrange for diligent efforts to be undertaken to revise
 20 the Product's formulations so as to *eliminate the presence of lead*, as that phrase is
 21 defined in paragraph 1.4, below. As of July 31, 2002, Markwins agrees not to
 22 manufacture or sell (or cause to be manufactured or sold on its behalf) any of the Products
 23 unless each such Product has been manufactures so as to *eliminate the presence of lead*, as
 24 that phrase is defined in paragraph 1.4, below....**1.4 Lead Content.** Through
 25 reformulation, Markwins intends to completely *eliminate the presence of lead* in the
 26 Products. Markwins asserts, however, that it may be impossible to remove all detectable
 27 amounts of lead from the Products. Therefore, for purposes of this Settlement Agreement,
 28 the *presence of lead* shall be deemed to be *eliminated* in the Products according to the

1 following schedule: 1) no lipstick shall contain greater than .35 parts per million (ppm) of
2 lead; and 2) no other cosmetic item, including eyeshadows and blushes, shall contain
3 greater than .5 parts per million (ppm) of lead. Markwins shall use EPA testing
4 methodology 6020 or 6010 to determine whether the respective levels have been exceeded
5 in their cosmetic products. The parties agree that Markwins may modify the test method
6 so long as: 1) the method is appropriate under 22 CCR § 12901; and 2) DiPirro is
7 provided 30 day written notice of the requested modification. Consent by DiPirro to such
8 modification shall not be unreasonably withheld.” (Emphasis in original.) The Consent
9 Judgment further expressly provided that “[n]othing in this Agreement shall be construed
10 as an admission by Markwins of any fact, finding, issue of law, assertion, allegation or
11 violation of law, nor shall compliance with this Agreement constitute or be construed as
12 an admission by Markwins of any fact, finding, conclusion, issue of law, or violation of
13 law.” (Exhibit 95).

14 After receipt of the Notice, neither Ms. Bokar nor Ms. Parker contacted the
15 cosmetic vendors to determine if their products contained lead. No further activities
16 occurred with respect to the cosmetics notice until April 25, 2002, when Plaintiff filed his
17 complaint against J.C. Penney. The complaint offered no additional information with
18 respect to the nature and extent of the alleged violations as set forth in the 60-day notices.
19 After the complaint was filed, J.C. Penney did not investigate through it RTL or inquiry of
20 vendors whether the cosmetic products contained lead. After receipt of the complaint, on
21 June 12, 2002, J.C. Penney sent correspondence to its cosmetic vendors tendering the
22 defense and indemnity of J.C. Penney for the lawsuit. (Exhibit 36.) The tender letters did
23 not inquire if the cosmetics products contained lead, nor did J.C. Penney test the
24 cosmetics for lead due to RTL’s unfamiliarity with cosmetics testing and inability to
25 perform tests on cosmetics. Specifically, the tender letters stated, in pertinent part, as
26 follows: “...The Notice and Complaint allege that J.C. Penney and its suppliers failed to
27 warn such persons of possible exposure, caused by the use of eyeshadows, blushers and
28 cosmetic kits it sells, to chemicals know to the State of California to cause cancer or

1 reproductive toxicity. Because your company supplies J.C. Penney with products that are
2 the subject of the enclosed Notice and Complaint, J.C. Penney hereby tenders this matter
3 to you for defense and indemnification....We respectfully demand a prompt response from
4 the appropriate person in your organization, so that we may address this situation before
5 incurring significant legal fees. Please let us know at your earliest opportunity how you
6 wish to proceed.” The tender letters were sent to the following vendors: Rivera, Inc.,
7 Avon, Color Me Beautiful, Revlon, Inc., Fashion Fair, and Markwins International.
8 (Exhibit 36). Throughout June 2002, J.C. Penney received responses to its tender letters,
9 and other communications, from a number of its cosmetic vendors, including Private
10 Portfolio/Riviera Concepts, Fashion Fair and Revlon. (Exhibits 1012, 1013.) No vendor
11 indicated that its products did not comply with Proposition 65. No vendor indicated that
12 its products exposed consumers to lead.

13 J.C. Penney filed a Demurrer on June 11, 2002, which came on for regular hearing
14 on July 18, 2002. This Court found that the Plaintiff’s “60-Day Notice”, and the ensuing
15 Complaint, adequately complied with all of the notice requirements of California Health
16 & Safety Code, Section 25248.7, such as to give Defendant adequate description of the
17 products at issue and adequate notice of Plaintiff’s claims against them. Based upon these
18 and other findings, J.C. Penney’s Demurrer was overruled. On October 21, 2002,
19 Defendants filed their petition for writ of mandate contesting the ruling on Demurrer. On
20 November 7, 2002, the First Appellate District denied Defendants’ petition for writ of
21 mandate without comment.

22 On September 23, 2002, J.C. Penney served Special Interrogatories on Plaintiff
23 requesting, inter alia, that Plaintiff identify any cosmetics sold by J.C. Penney that
24 allegedly contained or exposed users to lead, other than those manufactured by Markwins.
25 (Exhibit 60s.) Plaintiff’s initial response to J.C. Penney’s discovery did not identify any
26 additional cosmetic kits and merely referred to the 60-Day Notice. (Exhibit 6Ps.)
27 Following a meet and confer process, Plaintiff agreed to supplement his responses to J.C.
28

1 Penney's discovery, however, his supplemental responses did not identify any additional
2 cosmetic kits and referred, again, to the 60-Day Notice. (Exhibit 6Qs.)

3 J.C. Penney filed a Motion for Summary Judgment on December 24, 2002
4 contending that there was no triable issue of fact, since Plaintiff had released J.C. Penney
5 from liability for sale of Markwins products as a result of his settlement with Markwins,
6 was limited to the Markwins products by his 60-day notice, and had failed to identify any
7 other allegedly violative cosmetic kits. After a continuance to allow Plaintiff to conduct
8 discovery, that motion was heard on June 23, 2003, and denied in an order dated
9 September 8, 2003.

10 On January 27, 2002, Plaintiff's second supplemental discovery responses
11 identified the following additional cosmetic kits sold by J.C. Penney that allegedly
12 contained lead: Luxurious Traincase, Riviera Concept's Inc.'s Professional Blockbuster
13 kit. (Exhibit 6Rs.) On April 21, 2003, Plaintiff's fourth supplemental discovery
14 responses identified Sheer Halston The Holiday Evening Accessory Collection; and IMS
15 Industry Color Impact the Cool Bag. (Exhibit 6Ss.) Plaintiff for the first time produced
16 summary lead testing results with his fourth supplemental interrogatory responses. On
17 May 1, 2003, Plaintiff's supplement to his fourth supplemental interrogatory responses
18 identified Elizabeth Taylor Passion the Holiday Evening Collection. (Exhibit 6Ts.).

19 Plaintiff did not produce documents identifying the laboratory testing of the
20 cosmetics until after the commencement of trial, claiming that discovery prior to that time
21 was precluded by the work product doctrine.

22 On June 2, 2002 and June 3, 2002, Plaintiff propounded his First and Second Sets
23 of Special Interrogatories to J.C. Penney regarding cosmetic kits and painted glassware,
24 respectively. In these sets, Interrogatory No. 1 requested that, in response to a request for
25 the total unit quantity of products sold, J.C. Penney identify the cosmetic kits or painted
26 glassware sold by brand name, product name and product description. Defendant's
27 responses to this discovery request did not identify any such types of products sold by J.C.
28 Penney. J.C. Penney responded with a global objection to Plaintiffs definition of

1 “PRODUCTS”, in that, “it requests information about products not sufficiently identified
 2 in Plaintiff’s 60-day notice, and thus seeks information that is NOT RELEVANT.”
 3 Plaintiff served additional discovery on March 13, 2003, seeking, among other things,
 4 product identification. On June 5, 2003, at a hearing before Commissioner Norris on
 5 Defendants’ Motion for a Protective Order, Plaintiff was ordered to designate up to 75
 6 interrogatories for J.C. Penney to answer. Defendants’ June 30, 2003 responses did not
 7 identify any cosmetic kits sold by Macy’s West pending a ruling on their Motion for
 8 Summary Judgment. (On July 15, 2003, Plaintiff made an Ex Parte Application to have
 9 his Motion to Compel heard on shorten time, a motion that Commissioner Norris denied.)
 10 In response to a PMK deposition notice, J.C. Penney designated the following people:
 11 Richard Brinkman, Catherine Parker, Owen Jones, Catherine Bokar, Judy Strothers, Frank
 12 Gaynor, John Caldwell, and Kevin McGhee. Plaintiff objected that the witnesses were not
 13 qualified witnesses in that they had not done a sufficient investigation and were not
 14 knowledgeable.

15 C. J.C. Penney’s Actions Following Receipt of Notice for Glassware

16 On December 31, 2001, Plaintiff served J.C. Penney with a 60-Day Notice of
 17 alleged violation of Proposition 65 for selling certain painted glassware containing lead
 18 without a clear and reasonable warning. See Exhibit 92. The notice specifically
 19 referenced only San Nicolo OTR/DOF Romania, Style:98306 SN, and identified Dansk
 20 International Designs as the manufacturer of the products at issue. In or around
 21 January 2002, after receiving Plaintiffs 60-day notice regarding glassware,
 22 Richard Brinkman contacted Steve Carlson at Lenox regarding the San Nicolo products.
 23 Mr. Carlson informed Mr. Brinkman that they were reformulating the product. (Brinkman
 24 Trial Testimony, 9/16/03.) Mr. Brinkman also confirmed that the San Nicolo products
 25 were essentially out of stock, so no stop-sale was issued. The only other hand painted
 26 glassware carried by J.C. Penney in January 2002 was manufactured by PGM in Romania.
 27 Mr. Brinkman confirmed that the PGM product did not contain lead in the pigment. As a
 28 precautionary measure, Mr. Brinkman advised the suppliers of the painted glassware that

1 he was negotiating new orders with (namely Gibson, Home Essentials and Salton) to both
2 keep paint out of the lip and rim area, as well as, place Proposition 65 warnings on the
3 boxes.

4 J.C. Penney filed a Demurrer on June 11, 2002, which came on for regular hearing
5 on July 18, 2002. This Court found that the Plaintiff's "60-Day Notice", and the ensuing
6 Complaint, adequately complied with all of the notice requirements of California Health
7 & Safety Code, Section 25248.7, such as to give Defendant adequate description of the
8 products at issue and adequate notice of Plaintiffs claims against them. Based upon these
9 and other findings, J.C. Penney's Demurrer was overruled. On October 21, 2002,
10 Defendants filed their petition for writ of mandate contesting the ruling on Demurrer. On
11 November 7, 2002, the First Appellate District denied Defendants' petition for writ of
12 mandate without comment.

13 J.C. Penney filed a Motion for Summary Judgment on December 24, 2002
14 contending that there was no triable issue of fact, since Plaintiff had released J.C. Penney
15 from liability for sale of Markwins products as a result of his settlement with Markwins,
16 was limited to the Markwins products by his 60-day notice, and had failed to identify any
17 other allegedly violative cosmetic kits. After a continuance to allow Plaintiff to conduct
18 discovery, that motion was heard on June 23, 2003, and denied in an order dated
19 September 8, 2003.

20 On January 15, 2003, Plaintiff served a deposition notice on J.C. Penney that
21 identified Certified International Sunrise and Flora Goblets as painted glassware that
22 contained lead. (Exhibit 193.) On January 27, 2003, Plaintiffs second supplemental
23 interrogatory responses identified Certified International Sunrise Goblet, Certified
24 International Midnight Christmas Set, and Certified International Flora Goblet.
25 (Exhibit 6Rs.) On February 5, 2003, the deposition of Plaintiff Michael DiPirro was taken
26 but no additional painted glassware products were identified as being at issue in the
27 lawsuit. On February 21, 2003, Plaintiff served his third supplemental responses to J.C.
28 Penney's first set of discovery that identified Certified International Midnight Christmas.

(Exhibit 6Ss.) On April 21, 2003, Plaintiff served his fourth supplemental responses to J.C. Penney's first set of discovery and identified Salton At Home Jonal Hudson Valley 5 Piece set; Libbey Orchard Fruit 12 pc glassware set, J.C. Penney Glass Ice Tea, Home Essentials and Beyond (Country Garden set of 4 14 oz. hand painted goblets, Flamingo set of 4 hand painted Wine Glasses, Vintage hand painted collection set of four Fine Hand Painted Wine Goblets, Golden Orchard set of 4 hand painted Goblets, 18 oz.); Gibson Elite (crazy Daisies 5 piece Drinkware Set, Tropical Delight 5 piece Drinkware Set); Pfaltzgraff French Quarter Set/ 4 coolers, 15 oz;. (Exhibit 6Ts).

Plaintiff for the first time produced summary lead testing results with his fourth supplemental interrogatory responses. On May 1, 2003, Plaintiff's supplement to his fourth supplemental interrogatory responses identified Pfaltzgraff Rio & Orleans. (Exhibit 6Ts.)

Plaintiff did not produce documents identifying the laboratory testing of the glassware until after the commencement of trial, claiming that discovery prior to that time was precluded by the work product doctrine.

At the beginning of trial, Plaintiff also served discovery on J.C. Penney in the form of Special Interrogatories and Requests for Production. The July 31, 2003 hearing before the Court narrowed the breadth and scope of this discovery significantly, including developing a definitive definition of "cosmetic kit". Defendant J.C. Penney served responses to Plaintiff's first set of trial discovery on August 8, 2003. The responses identified cosmetic products that were both within and outside of the Court's definition of "cosmetic kit". J.C. Penney also identified additional decorated glassware.

SUMMARY OF APPLICABLE LAW

I. LEGAL BACKGROUND

A. *Proposition 65*

"The Safe Drinking Water and Toxic Enforcement Act of 1986," commonly known as Proposition 65 (Health & Safety Code §§ 25249.5 et seq.), was adopted by the people of California on November 4, 1986. The initiative declared the public's right to protect

1 themselves against and to be informed about exposures to chemicals that cause cancer,
2 birth defects, or other reproductive harm. See Proposition 65, § 1(a), (b).

3 Proposition 65 requires the Governor of the State of California to list the chemicals
4 that are “known” to cause cancer or reproductive toxicity in the California Code of
5 Regulations. Health & Safety Code 25249.8. The initiative has two main provisions.
6 First, it bans the discharge of listed chemicals into sources of drinking water. Health &
7 Safety Code § 25249.5. Second, the Act requires that a warning be given for exposures to
8 listed chemicals above certain levels. Health & Safety Code § 25249.6. With regard to
9 that warning requirement, § 25249.6 provides as follows:

10 “No person in the course of doing business shall knowingly and intentionally expose
11 any individual to a chemical known to the state to cause cancer or reproductive
12 toxicity without first giving clear and reasonable warning to such individual, except as
13 provided in Section 25249.10.”

14 Section 25249.12 provides that the Governor shall designate a “lead agency” to
15 implement the provisions of Proposition 65. The lead agency is empowered to adopt
16 regulations, as necessary, in order to conform with and implement the purposes of the
17 initiative. *Id.* On January 6, 1987, the governor designated as lead agency the state Health
18 and Welfare Agency (Agency). (Executive Order D-61-87 (Jan. 6, 1987); see *Ingredient*
19 *Communication Council, Inc. v. Lungren*, 2 Cal.App.4th 1480, 1485 (1992)).¹⁴ “Lead”
20 was listed by the governor as a reproductive toxin on February 27, 1987 (22 Cal. Code
21 Regs. § 12000(b)). Lead was included in the initial list of known carcinogens and
22 reproductive toxins based on the requirement that the governor list all chemicals included
23 in Labor Code § 6382. *AFL-CIO v. Deukmejian*, 212 Cal.App.3d 425, 432 (1989)
24 (reproductive toxins that were included in the initial list on February 27, 1987 “includes
25 ALL known human reproductive toxicants as listed by the U.S. Department of Labor’s
26 Occupational Safety and Health Administration (OSHA)” (emphasis in original)).

27 ¹⁴ In 1991, when the California Environmental Protection Agency was created, the Governor transferred “lead
28 agency” responsibilities to Cal/EPA’s Office of Environmental Health Hazard Assessment (“OEHHA”). (Executive
Order W-15-91 (July 17, 1991); see *People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 310 & fn. 6 (1996)).

1 In furtherance of its duty to implement the Act, CHWA adopted emergency
 2 regulations during 1987-1988, and by 1989 adopted a series of final regulations that
 3 included definitions (See 22 Cal. Code Regs. Division 2, Articles 1-3, and Final Statement
 4 of Reasons (Exhibit 1004)), warnings (See Final Statement of Reasons, Article 6
 5 (Exhibit xxxx), and exemptions from the warning requirement (See 22 Cal. Code Regs.
 6 Division 2, Articles 7 and 8, and Final Statement of Reasons (Exhibit G)) and methods of
 7 detection (See 22 Cal. Code Regs. Division 2, Article 9, and Final Statement of Reasons
 8 (Exhibit xxx). The implementing regulations were codified at 22 Cal. Code Regs. §
 9 12000 et seq. In 1996, OEHHA adopted a regulation governing the provision of 60-day
 10 notices. 22 Cal. Code Regs. § 12903, and Final Statement of Reasons (Exhibit xxx).

11 The Proposition 65 regulations define “expose” to mean, “to cause to ingest,
 12 inhale, contact via body surfaces or otherwise come into contact with a listed chemical.”
 13 22 Cal. Code Regs. § 12102(i). The exposure at issue is only to chemicals listed under
 14 Proposition 65. *Consumer Cause, Inc. v. Arkopharma, Inc.*, 106 Cal.App.4th 824, 829
 15 (2003); *Consumer Cause, Inc. v. Weider Nutrition International, Inc.*, 92 Cal.App.4th 363,
 16 369 (2001). “[T]he Health and Welfare Agency has broadly defined the term ‘exposure’
 17 to include all anticipated means of bringing individuals into contact with chemicals.
 18 Examples of these means are provided to further clarify that the Act prohibits all means of
 19 directly bringing individuals into contact with chemicals known to the state to cause
 20 cancer or reproductive toxicity without clear and reasonable prior warning.” *Consumer*
 21 *Cause, Inc. v. Weider Nutrition International, Inc.*, 92 Cal.App.4th at 368, citing FSOR,
 22 22 CCR at 29. The Attorney General reasons: “while the regulation provides examples of
 23 types of exposure, e.g., ingestion, inhalation, each type is inextricably tied to the phrase
 24 ‘come into contact[.]’ ‘Contact’ occurs at the first point at which the body connects with a
 25 chemical from outside the body.” *Id.* at 369.

26 The Proposition 65 regulations define “knowingly” as “knowledge of the fact that
 27 a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a)
 28 of the Act is occurring. No knowledge that the discharge, release or exposure is